

PERMITTEE: BENDERSON DEVELOPMENT COMPANY, INC.

PERMIT NUMBER: 95-987-1(1)

EFFECTIVE DATE: _____

NOTE: The term you and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below. (and continue on page 5)

PROJECT DESCRIPTION: BENDERSON DEVELOPMENT COMPANY, INCORPORATED, 570 DELAWARE AVENUE, BUFFALO, NEW YORK 14202-1284, IS HEREBY AUTHORIZED BY THE SECRETARY OF THE ARMY TO: FILL 6.6 ACRES OF WETLAND, AND FILL AND RELOCATE APPROXIMATELY 4,600 LINEAR FEET OF A TRIBUTARY TO MUD CREEK IN ACCORDANCE WITH THE GENERAL AND SPECIAL CONDITIONS, AND THE PLANS AND DRAWINGS AND ANY ADDITIONAL SPECIAL CONDITIONS ATTACHED HERETO WHICH ARE INCORPORATED IN AND MADE A PART OF THIS PERMIT.

PROJECT LOCATION: THE PROJECT IS LOCATED IN A FRESHWATER WETLAND AND AN UNNAMED TRIBUTARY TO MUD CREEK, IN THE TOWN OF NEW HARTFORD, ONEIDA COUNTY, NEW YORK.

PERMIT CONDITIONS

GENERAL CONDITIONS:

1. The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you must make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity, or should you desire to abandon it without a good faith transfer, you may obtain a modification of this permit from this office, which may require restoration of the area.
3. If you discover any previously unknown historic or archaeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.
4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.
5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit.
6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

FURTHER INFORMATION:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

Section 404 of the Clean Water Act (33 U.S.C. 1344).

2. Limits of this authorization.
 - a. This permit does not obviate the need to obtain other Federal, state or local authorizations required by law.
 - b. This permit does not grant any property rights or exclusive privileges.
 - c. This permit does not authorize any injury to the property or rights of others.
 - d. This permit does not authorize interference with any existing or proposed Federal project.
3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (see 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as this specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE)

(DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

(DISTRICT COMMANDER)

(DATE)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(TRANSFEREE)

(DATE)

SPECIAL CONDITIONS:

1. Upon request of an authorized representative of the Buffalo District, U.S. Army Corps of Engineers (USACE), you shall allow access to the project site and mitigation parcels to determine compliance with the terms and conditions of this permit.
2. The loss of 6.6 acres of wetland will be mitigated by creating 10.27 acres of wetland, including relocation and enhancement of approximately 4,600 linear feet of the tributary to Mud Creek. Mitigation will also include the preservation of 9.53 acres of wetland and 21.97 acres of upland, in addition to the 10.27 acres of wetland construction and 5.83 acres of riparian buffer. A total of 47.6 acres of wetland and upland, including that portion of the Liberty Gardens tributary located on the acreage owned by the permittee, and the relocated stream corridor shall remain protected in perpetuity. You shall implement the Mitigation and Monitoring Plan (M&MP), dated May 2000, prepared by Beak Consultants Incorporated, and approved by the Buffalo District, USACE on May 30, 2000. Relocation of the tributary to Mud Creek shall conform to the design methodologies in the report prepared by Aquafor Beech Limited, and submitted by Beak Consultants Incorporated on January 26, 2000.
3. You are responsible for ensuring that the contractor and/or workers executing the activity(s) authorized by this permit have knowledge of the terms and conditions of the authorization and that a copy of the permit document, including the M&MP is at the project site throughout the period the work is underway.
4. All correspondence and request for approvals required within the special conditions of this permit shall be made to Ms. Diane C. Kozlowski or Mr. Fred Dieffenbach (USACE representatives). In their absence all correspondence and request for approvals shall be made to the Buffalo District Commander. Ms. Kozlowski or Mr. Dieffenbach can be reached by calling 716-879-4433 or 4317, at facsimile number 716-879-4310, or email address Diane.C.Kozlowski@usace.army.mil or Fred.W.Dieffenbach@usace.army.mil, respectively.
5. Prior to initiation of work authorized by this permit, a pre-construction meeting shall be held. Representatives of Beak Consultants Incorporated, the independent inspector (Special Condition No. 6), the prime contractor and all sub-contractors are required to participate in the meeting. You shall contact the USACE representative to schedule the pre-construction meeting prior to the start of construction.
6. You shall appoint a scientifically qualified individual to oversee the construction of the wetland mitigation areas and tributary relocation. This person shall ensure that sediment and erosion controls are properly installed and maintained, wetlands to remain undisturbed are protected from construction activities, and that implementation of the M&MP proceeds as approved. The inspector hired for this task must be independent from Benderson Development Company, its affiliates, construction contractors, and environmental inspection staff. You must provide the name and qualifications of the inspector. The inspector must function independently

from Benderson's inspection staff and address all aspects of the

SPECIAL CONDITIONS CONTINUED:

inspector's authority, duties, and reporting procedures. The inspector must have equipment and appropriate points of contact to maintain an efficient and effective line of communication with Benderson's inspection staff and the USACE representative. The inspector must be approved by the District Commander prior to commencing any work in waters of the United States. If the permittee terminates its contract with the independent inspector, work authorized by this permit shall cease until a replacement for the independent inspector is approved by the District Commander, and hired and present on the construction site. At a minimum, the independent inspector shall be present to observe the following:

- a. Initial clearing and grading (minimally the first full week of work);
- b. Initiation of earthwork within the riparian forest;
- c. Initiation of earthwork in and near (within 100 feet) the Liberty Gardens tributary;
- d. Initiation of the placement of stone within the relocated stream channel, and the habitat enhancements;
- e. Review of grades and prior to the placement of topsoil;
- f. Completion of streamwork prior to diversion of water from the original tributary;

Additionally, the independent inspector shall conduct periodic inspections on a weekly basis throughout the construction of the wetland and stream relocation.

7. Construction of the channel through the existing riparian habitat shall be non-invasive, and minimize removal of and disturbance to vegetation outside the channel and bank boundary. No work associated with construction of the new channel through the riparian forest shall be conducted until after July 15 to avoid disturbance to breeding fauna.

8. All erosion and sediment control practices shall be placed prior to any grading or filling operations and installation of proposed structures or utilities. They shall remain in place until construction is completed and the area is stabilized. Erosion control devices shall be monitored daily and where necessary repaired to insure they are functioning properly. The USACE representative is required to inspect and approve the erosion control system before work can proceed. The permittee will be responsible for the restoration of wetland and water resources compromised as a result of failure to maintain erosion and sediment controls.

9. A post-construction report shall be submitted to the USACE representative within 60 days after construction of the mitigation areas is completed. The post-construction report shall contain engineering drawings (plan view with 1 or 2 foot contour intervals, and cross sectional views) showing as-built features of the wetland and stream mitigation areas.

SPECIAL CONDITIONS CONTINUED:

10. You shall submit annual monitoring reports on the status of the wetland and stream mitigation areas. The first report is due on November 1 after the first full growing season following completion of the mitigation work. Subsequent reports shall be submitted on or before November 1 for a minimum of 4 consecutive years. Monitoring reports shall be submitted to the USACE representative.

11. At the end of the monitoring period, the mitigation wetlands shall be vegetated with a minimum of 70% areal cover of hydrophytic plants (FACW or wetter indicator status, excepting for woody species which may be FAC or wetter indicator status). In addition, less than 5% areal cover of the mitigation areas shall be vegetated with the following invasive species: *Lythrum salicaria*, *Phragmites* sp., *Phalaris arundinacea*, *Solanum dulcamara*, *Rhamnus frangula*, *Myriophyllum spicatum*, *Typha angustifolia*, and *Typha x glauca*. In the event these criteria are not met, the permittee shall propose remedial actions to the USACE representative. These actions may include, but are not limited to regrading, seeding or planting, construction or removal of berms and installation of water controls. Such remedial actions shall be reviewed and approved by the USACE representative prior to the permittee taking such action(s).

12. The location of temporary stream crossings, once determined by the contractor, shall be approved by the USACE representative. Information describing the crossings shall include a location map and typical section drawings. The location of the crossings shall avoid and minimize temporary impacts to wetlands to the greatest extent practicable. The temporary crossings, once approved are hereby incorporated as part of this permit.

13. There shall be no construction or subsequent placement by the permittee, its agents, successors or assignees of buildings, utility lines, drainage work, fences, signs, billboards or other advertising material, within the limits of the designated mitigation and preservation areas. The permittee shall periodically inspect the mitigation and preservation areas to ensure they are kept free of trash and debris, to the maximum extent practicable.

14. All excess dredged or excavated material not used for project purposes shall be disposed of at an upland disposal site. There shall be no temporary or permanent stockpiling of any material within any regulated water or wetland not authorized to be disturbed by this permit. Materials removed to upland disposal sites shall be stabilized and confined to preclude erosion that will compromise water quality of potential receiving streams or wetlands.

15. Site construction activities shall be carried out in a way that precludes construction debris from entering waters or wetlands. Accidental debris deposition shall be removed immediately

upon discovery. Removal shall be by hand if necessary, to avoid damaging aquatic resources.

SPECIAL CONDITIONS CONTINUED:

16. Fill material authorized by this permit shall be free of oil and grease, debris, wood, general refuse, plaster, and other pollutants, and shall contain no broken asphalt.

17. That the Water Quality Certification issued for this project by the State of New York is part of this Department of the Army permit pursuant to Section 401(d) of the Clean Water Act. Noncompliance with any limitations or requirements stated in the certification may be a basis for suspension, revocation or modification of this permit.

Department of the Army Permit No.: 95-987-1(1)

**NOTIFICATION OF APPEAL PROCESS (NAP)
FOR A PERMIT DENIAL OR A DECLINED INDIVIDUAL PERMIT**

You are hereby notified that you and/or your authorized agent(s) may appeal a permit denial or a declined individual permit under the Corps of Engineers Administrative Appeal Process. The administrative appeal process may be initiated by completing the enclosed Request For Appeal (RFA) form. The RFA should be submitted to the division engineer, Great Lakes and Ohio River Division, P.O. Box 1159, Cincinnati, OH 45201-1159, and must be received by the division engineer within 60 days of the date of this NAP. The RFA will be reviewed and processed in accordance with the procedures set forth in 33 CFR Part 331.

REQUEST FOR APPEAL (RFA)

Name of Appellant: Benderson Development Company, Inc.

Corps File Number: 95-987-1(1)

Date Filed: _____

Reason(s) for Appeal:
(attach additional pages as needed)

CONDITIONS:

1. The reason(s) for requesting an appeal should be clearly stated, and your explanation must contain detailed information explaining the grounds for your appeal of the permit decision, or your appeal of the declined individual permit.
2. The appeal of a permit denial, or a declined individual permit, is limited to a review of the administrative record, the record of the appeal conference, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant or the Corps may raise new issues during the appeal process, but both parties may provide additional information as needed to clarify issues already identified in the administrative record.
3. You must grant right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

I have read and fully understand the above conditions. I am signing this document to request initiation of an administrative appeal.

Appellant

June 1, 2000

Department of the Army Permit No.: 95-987-1(1)

**NOTIFICATION OF APPLICANT OPTIONS (NAO)
FOR PARTIES ISSUED A DEPARTMENT OF THE ARMY INDIVIDUAL PERMIT**

You are hereby advised that the following options are available to you in your evaluation of the enclosed permit:

1) You may sign the permit, and return it to the district engineer for final authorization. Your signature on the permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, or its terms and conditions.

2) You may decline to sign the permit because you object to certain terms and conditions therein, and you may request that the permit be modified accordingly. You must outline your objections to the terms and conditions of the permit in a letter to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this NAO, or you will forfeit your right to request changes to the terms and conditions of the permit. Upon receipt of your letter, the district engineer will evaluate your objections, and may: (a) modify the permit to address all of your concerns, or (b) modify the permit to address some of your objections, or (c) not modify the permit, having determined that the permit should be issued as previously written. In any of these three cases, the district engineer will send you a final permit for your reconsideration, as well a notification of appeal (NAP) form and a request for appeal (RFA) form. Should you decline the final proffered permit, you can appeal the declined permit under the Corps of Engineers Administrative Appeal Process by submitting the completed RFA form to the division engineer. The RFA must be received by the division engineer within 60 days of the date of the NAP that was transmitted with the second proffered permit.